Court of Appeals

FOR THE NINTH CIRCUIT

FRANK P. McKINNEY, as Receiver of the Olympia Bank & Trust Company, a Corporation,

Appellant,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the United States National Bank of Centralia,

Appellees,

and

C. S. REINHART and C. WILL SHAFFER, Stockholders of Olympia Bank & Trust Company, a Corporation, for themselves and all other stockholders of said Company,

Appellants,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the United States National Bank of Centralia,

Appellees,

and

ROY A. LANGLEY, as Receiver of the State Bank of Tenino,

Appellant,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the United States National Bank of Centralia,

Appellees.

PETITION OF APPELLEES FOR MODIFICATION OF DECREE OR FOR REHEARING.

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Your Honors' decision in this cause cannot, we believe, in its main features, be successfully assailed;

been led astray.

The points to which we shall direct attention were not previously dealt with in detail, and, in fact, since we could not anticipate the particular grounds upon which your Honors' opinion was to be rested, and the theory upon which you would dispose of the case, could not have been anticipated by counsel in preparing the briefs formerly filed and in the argument of the cause. This, we trust, will seem an adequate justification for our calling particular attention to them now, in the same degree that it seems to us an explanation of the Court's overlooking them, since only in the light of your Honors' decision have the facts to which we shall now direct attention become of controlling importance.

These points are:

1. The allowance of a preferred claim.
2. The allowance of the additional $10,000 claim for moneys advanced by the Olympia Bank to the Tenino Bank; or
3. If such claim be allowed, the failure to allow the United States National Bank a claim in the same amount against the Tenino Bank.

We shall refer to these in order.

1. *The allowance of a preferred claim.*

As to the funds remitted by the Olympia Bank

Court, that the funds were not traced into the possession of the Centralia Bank but were remitted to various other banks. As to the $2,203.91, Your Honors allowed a preferred claim on the ground that this fund was traced into the Centralia Bank. We think that the application of the same reason which denied a preferred claim as to the rest of these funds should operate to deny a preferred claim as to this amount also.

The items making up the total of $2,203.91 are set forth in the transcript, p. 158, and are as follows:

August	25	$ 160.38
"	26	255.95
"	26	358.10
"	27	147.25
"	28	147.00
"	31	216.60
"	31	52.00
September	1	56.50
"	2	338.30
"	2	94.65
"	5	377.18
Total		$2,203.91

Upon the face of the exhibit just quoted, appearing at page 158 of the transcript, your Honors' ruling might seem to be justified, but turning to page 224 *et seq.,* where these various remittances are set forth

part—on various banks in the State of Washington and elsewhere. There is not the slightest suggestion *that the United States National Bank ever received one dollar in actual money upon any of these checks,* and we think it clear that, under authorities already so well known to your Honors as not to require citation, the Olympia Bank would not be entitled to a preferred claim as to these amounts, *without showing that they were not only collected by the bank but came into the hands of the receiver.* Proof on both of these points is entirely lacking. The probabilities are, of course, that they were transmitted to other banks and used for the purpose of paying the debts of the United States National Bank. But we need not speculate as to this. The burden is on the plaintiff under all the authorities to prove that we received their proceeds.

In *Empire State Surety Company v. Carroll County,* 194 Fed. 593 (C. C. A. 8th Ct.), where precisely similar facts were involved, at page 606 the Court says, referring to a contention that the plaintiff was entitled to a preferred claim as to the proceeds of certain checks deposited on the last day the bank was open:

> "But this record has been searched in vain for any evidence that the checks for the $1,602.88 deposited on the last day the bank was open ever

derived from them ever went into the $5.912.05, or into the hands of the receiver. Proof that these checks augmented the cash that went into the hands of the receiver, or that they produced cash which he obtained, was indispensable to any preference on their account."

Referring to a similar contention, the Oklahoma Court says, in *Cherry v. Territory,* 89 Pac. 190, page 191:

> "It is not contended that the particular checks and drafts deposited went into the hands of the receiver, *nor does the evidence show that the proceeds therefrom were received by him. Until this is shown, the amount of the checks cannot be allowed as a preferred claim."*

Upon the facts as they actually appear in the record, though not upon the facts as stated in your Honors' opinion, your holding is, we believe, inconsistent with your recent decisions in *Titlow v. McCormick,* 236 Fed. 209, and *Titlow v. City of Centralia,* 240 Fed. 93.

Further than referring to the case of *Schuyler v Littlefield,* 232 U. S. 707, 58 L. Ed 806, (followed by this Court in the *McCormick* case), upon the point that the burden of proving, beyond doubt, the identification of the property to which a preference is claimed is upon the claimant, and to the leading case of

consideration by your Honors, but refer to the authorities cited in our briefs in the *McCormick* and *City of Centralia* cases.

The Court will note that four of the checks aggregating $317 (see Tr. 224, first item; 225, first item; 226, last item; 234, second item), were on the United States National Bank itself. As to this it is plain under the authorities already cited (see *Carroll County* case, 194 Fed. at p. 606; also *American Can Co. v. Williams*, 178 Fed. 420) that no preference can be claimed, since they were obviously used in paying the debts of the United States National Bank to the depositors who drew them.

2. *The allowance of the additional $10,000 claim for moneys advanced by the Olympia Bank to the Tenino Bank.*

The basis of your Honors' decision on this point is that you find an indebtedness existing from the Centralia Bank to the Tenino Bank at the time Gilchrist made this alleged request of Hays to send funds to Tenino. Your Honors, after discussing other points having a possible bearing upon this feature of the case, say:

> *"However that may be, the controlling facts are that the Centralia Bank was indebted to the Tenino Bank.* The Olympia Bank was not. The

And again:

> "The funds so remitted were properly chargeable against the Centralia Bank as evidencing *an indebtedness from that bank to the Olympia Bank,* and it follows that the claim of the Olympia Bank against the Centralia Bank should be allowed."

We shall not burden your Honors with a further discussion of the somewhat conflicting testimony in regard to this matter. It is discussed and largely set out in full at pages 51-60 of our brief. The point that we call attention to here is that the supposed indebtedness from the Centralia Bank to the Tenino Bank, which constitutes the basis of your decision upon this point, has, *under your Honors' ruling in this very case upon the appeal of the Tenino Bank,* no foundation in reality; your Honors have yourselves decided that this indebtedness either *did not exist* or was much less than the decision upon this feature of the case assumes.

The Court inclines to credit Blumauer's testimony upon this point on account of its definiteness, and at page 9 of your typewritten opinion you set forth the various amounts which he testifies the Centralia Bank owed the Tenino Bank on the various dates at which the transactions in question occurred. Now Your Honors have held in this very appeal that the

been willing to concede. Your Honors hold with our contention that the Tenino Bank is chargeable with certain drafts of the Tenino Bank upon Centralia for $2,500, payable to a Portland bank, and with a further sum of $5,000 charged by the Centralia Bank to Tenino on account of the W. Dean Hays note. *Neither of these transactions was ever shown upon the Tenino Bank's books, from which Blumauer was testifying,* or has been admitted by the Tenino Bank as a proper charge until your Honors' decision established both as such.

Our opponents say, at page 53 of their opening brief (referring to charging the $5,000 Hays note on the books of the United States National Bank to the State Bank of Tenino), "No entry of this transaction ever was made on the books of the State Bank of Tenino. (Tr. 108.)"

As to the $2,500 drafts, these, as appears from page 187 of the transcript of the record, were charged by our bank to Tenino on March 5, May 23, May 25, and July 30, 1914. But Blumauer testifies (Supp. Tr., p. 403), "The Tenino Bank made no record of it at all (this $2,500 in drafts). After I sent the drafts away, that was all there was to it. I made no record of it. As near as I can recollect there was no record in the Tenino Bank that these drafts were sent."

books. Therefore, $7,500 should be deducted from each of the balances that he claimed the Centralia Bank owed Tenino, so that, on September 12th, when the sum of *$6,000* (a part of this $10,000), was sent by Olympia to Seattle for Tenino (Tr. 157), the Tenino Bank's books should have showed an indebtedness of *only $1,500* from Centralia to Tenino, instead of $9,000 as he testifies. On the 14th the date Tenino charged the $6,000 to us (Tr. p. 197), Tenino's books should have showed an *overdraft* of $201, instead of a credit of $7,299, as Blumauer testifies (Tr. 83). On the 15th, when the additional $2,000 was sent to Seattle in the same manner, Tenino had an *overdraft* of $500 with Centralia, instead of a credit of $7,000 as Blumauer testifies. And on the 18th, the date the remaining $2,000 was transmitted to Seattle for Tenino, Tenino, according to its own books, less this deduction, had a credit of *only $1,500* with Centralia, instead of $9,000, as Blumauer testifies.

Thus, on none of those dates, under facts now admitted, was the Centralia Bank indebted to Tenino for anything like the sum transferred to Seattle for Tenino, and on the date of one of the transfers, September 15th, Tenino was actually overdrawn $500. This

We feel that, with this element out of the case, there can be no question as to these funds having been advanced by Hays in order to help out the Tenino Bank. Blumauer testifies positively (Supp. Tr., p 117) that he had no instructions from anybody about it. That leaves Dysart and Gilchrist's testimony unchallenged except so far as Hays' evasions and self-contradictions may tend to controvert it.. For further discussion of the matter, we respectfully refer the Court to pages 51-60 of our principal brief.

As to the facts discussed by the Court concerning the dealings between Hays and Gilchrist, involving the stock of the Tenino Bank, we submit that these facts tend to strengthen our contention rather than to weaken it. Your Honors say, "Gilchrist did not deny that he had agreed to purchase Hays' stock, but he said that the negotiations were pending and not consummated. It thus appears that Gilchrist was interested in the welfare of the Tenino Bank." This is possibly true, but it has never been disputed that this interest, if any, *was a purely personal one of Gilchrist's,* which, of course, Hays, the other party to the transaction, knew all about. He therefore knew necessarily that Gilchrist could not pledge the credit of the United States National Bank for his own in-

This, we think, greatly strengthens Gilchrist's version of the transaction, that he explicitly told Hays that "it was up to him" (Hays) to take care of the Tenino Bank.

3. *If the $10,000 item covering the Tenino transaction is allowed the Olympia Bank, the Centralia Bank should be allowed credit in the same amount against Tenino.*

This is a proposition which we believe requires no elaboration. If your Honors adhere to your ruling that the Centralia Bank is chargeable with the $10,000 advanced to Tenino by Olympia, then this constitutes a new item in favor of Centralia in its account with Tenino, and the Centralia Bank should necessarily be allowed a credit in the same amount against the Tenino Bank. Unless your Honors make this correction, however, this feature of the decree will doubtless cause misunderstanding between the parties, and uncertainty and embarrassment upon the part of the Court below in making the modification which you have directed. In order to obviate this possibility, we think this correction should be made in the event that you finally hold us liable to Olympia for this $10,000 item.

We believe that all the particulars of your Honors' opinion to which we have directed attention can be

that only through such means can the desired charges be made.

We therefore respectfully petition your Honors to modify your decree in the particulars above noted; and, if necessary to effect this purpose, that a rehearing, so far as may be necessary to reconsider the points which we have just discussed, be granted.

Respectfully submitted,

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